In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 202

EDDIE DEAN GRIFFIN,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITION FOR REHEARING

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To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The respondent, the People of the State of California, respectfully petitions under Rule 58 for a rehearing by this Honorable Court of the above-entitled cause.

PRELIMINARY STATEMENT

Respondent respectfully urges this Court in considering this Petition for rehearing to consider the fact that in *United States v. Gainey*, 380 U.S. 63 (1965), it upheld a federal statutory presumption which authorizes a jury to convict a defendant for operating an illegal distillery solely on the basis of his presence at the site of an illegal still unless he explains his presence to the jury's satisfaction. In the case at bar, however, this Court holds unconstitutional a state rule which creates no presumption of guilt, nor warrants any inference of guilt, nor relieves the prosecution of any of its burden of proof, but which simply sanctions comment upon the manner in which the jury may evaluate prosecution evidence which a defendant has not explained or denied whether or not he has testified.

We submit that these two decisions are irreconcilable and that the validity of the holding in *Gainey* points up the invalidity of this Court's decision in this case. In the circumstances presented by either case, the defendant is left free to decide whether or not he will testify and any compulsion to testify which he may feel simply arises from the accusatory nature of the trial itself. *Yee Hem v. United States*, 268 U.S. 178, 185 (1924); *State v. Garvin*, 44 N.J. 268, 208 A.2d 402, 408 (1965).

ARGUMENT

I

CALIFORNIA'S LIMITED COMMENT RULE DOES NOT VIOLATE THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

By holding that the Fifth Amendment precludes reasonable comment upon the failure of an accused to explain or deny prosecution evidence presented against him during his criminal trial, this Court has elevated a legislative policy determination to the status of a constitutional mandate. Certainly nothing in the history of the privilege against compulsory self-incrimination suggests a preclusion against such comment. Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 Mich. L. Rev. 226, 233 (1932); 8 Wigmore, Evidence (McNaughton Rev. 1961), §§ 2250-2252; McCormick, Evidence pp. 279-280; *State v. Baker*, 115 Vt. 94; 53 A.2d 53, 57-60 (1947).

Indeed, the federal no comment rule, as first articulated by this Court, was predicated upon a statute enacted nearly 100 years after the adoption of the Fifth Amendment; a statute which for the first time made defendants in federal criminal cases competent to testify if they elected to do so but which also provided that a decision not to testify was to create no presumption against them. *Wilson v. United States*, 149 U.S. 60 (1893). That construction of the statute itself has been criticized as unduly indulgent to criminal defendants (Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 Mich. L. Rev. 226, 230 [1932]), but in any event this Court

was functioning there in its supervisory role over the federal courts.

It is apparent that this Court's holding invalidating the California comment rule is based upon two salient considerations. One is the finding that the comment rule is "in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." The other is the characterization of the comment rule as a rule permitting the imposition of a penalty for exercising a constitutional privilege in that it "cuts down on the privilege by making its assertion costly." We submit that these reasons neither individually nor together compel the holding that California's limited comment rule offends the privilege against compulsory self-incrimination.

In *Yee Hem v. United States*, 268 U.S. 178 (1924), an attack was made upon a federal statutory presumption which authorized a jury to convict a person for the possession of unlawfully imported smoking opium solely on the basis of possession of smoking opium unless the defendant explained its possession to the satisfaction of the jury. In disposing of the contention that the statutory presumption conflicted with the constitutional privilege against compulsory self-incrimination, this Court said as follows:

> "The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The stat-

ute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." 268 U.S. at 185.

In *United States v. Gainey*, 380 U.S. 63 (1965), this Court recently upheld a similar federal statutory presumption which permitted a jury to convict a defendant for carrying on the business of operating an illegal distillery solely on the basis of his presence at the site of the still unless he explained his presence to the satisfaction of the jury.

We submit that if the federal government, without violating the privilege against compulsory self-incrimination, can enact a statutory presumption authorizing conviction solely upon the basis of presence at the site of a crime unless that presence is explained to the satisfaction of the jury, certainly a state can

sanction limited comment upon the manner in which a jury may evaluate prosecution evidence which a defendant has not explained or denied. Any compulsion to testify inherent in the limited comment permitted by the California rule exists even more strongly in the federal statutory presumption upheld by this Court in *Gainey*.

We find the position of Mr. Justice Stewart and Mr. Justice White, both with the majority in *Gainey*, and dissenting in this case, quite consistent. Similarly we find the position of Mr. Justice Black and Mr. Justice Douglas, both dissenting in *Gainey* and with the majority in this case, quite consistent. However, we are at a loss to understand what influences the balance of this Court to invalidate California's limited comment rule while upholding the federal statutory presumption at issue in *Gainey*.

Certainly, if California's limited comment rule is unconstitutional because it "is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify," the federal statutory presumption at issue in *Gainey* is unconstitutional for the same reason. As Mr. Justice Black observed, dissenting in *Gainey*:

> "These statutory presumptions must tend, when incorporated into an instruction, as they were here, to influence the jury to reach an inference which the trier of fact might not otherwise have thought justified, to push some jurors to convict who might not otherwise have done so." 380 U.S. at 87.

And certainly, if California's limited comment rule is unconstitutional because it is a penalty imposed for exercising a constitutional privilege by cutting "down on the privilege by making its assertion costly," the same infirmity exists as to the federal statutory presumption upheld by this Court in *Gainey*. As Mr. Justice Black observed, dissenting in *Gainey*:

> "The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony." 380 U.S. at 87.

Realistically, it is neither the statutory presumption nor the comment rule which creates the compulsion to testify, but rather the coercive nature of the criminal trial itself. While the Constitution does afford to a defendant the right to remain silent, it cannot shield him from the evidence against him or the compulsion which it generates. As the New Jersey Supreme Court in *State v. Garvin*, 44 N.J. 268, 208 A.2d 402 (1965), observed:

> "When the State's case points an accusing finger directly at a defendant, common sense demands that he testify if in truth he is able to fend off the evidence against him. Neither the absence of comment nor an instruction against an adverse inference can dilute the inculpatory force of uncontradicted evidence of that character. This

> is the situation which confronted defendant in the case at hand. It would be sheer speculation to say that but for Corby he likely would have permitted the pointed testimony against him to go undenied. The great probability is that the testimony was the coercive force he could not resist." 208 A.2d at 408.

Finally, we submit that this Court should bear in mind that it is one thing to construe a federal statute which is enacted to regulate the practices of prosecutors and judges in the handling of criminal cases in the federal system. Reasonable men may differ as to the proper construction to be given the federal statute in question and the proper manner in which a criminal trial should be conducted to insure fairness and yet maintain the administration of justice.

It is another thing entirely to read into the Constitution of the United States a rigid and inflexible rule which will not only regulate procedure in the state courts but retroactively will upset hundreds if not thousands of final judgments of conviction. There are countless state prisoners who failed to testify in state trials and who stand convicted of serious criminal offenses. Every prisoner in this position can now claim that he has been denied his federal constitutional rights. Moreover, it is common knowledge that many of these prisoners are criminal offenders with a long series of prior felony convictions.

There are those who do not deem the large scale release of convicted criminals to be a significant consideration. And this may be true when there has

been a denial of fundamental fairness in the criminal proceedings. However, the practice in question here was overwhelmingly adopted by the People of California and made a part of its Constitution in 1933. Thereafter prosecutors and judges in California followed this constitutional directive as indeed they were bound to do by their oaths. Moreover, the comment rule was given the stamp of approval by the highest court in California and by this Court.

Now every conviction secured during those 32 years in which a defendant failed to take the stand may be subject to collateral attack. All this, not for any denial of fundamental fairness, nor even for any error, but because a majority of the members of this Court have concluded that there is a slight and almost imperceptible lack of symmetry between federal and California procedure.

We submit that the confidence of the bench, the bar and the people in our system of justice cannot survive under these conditions. Particularly is this so when it appears that different and more stringent Fifth Amendment standards are applicable to the states than to the federal government. Even more disquieting is the reliance by the majority of this Court upon the slogan that the comment rule is "a remnant of the 'inquisitorial system of criminal justice'"—a statement which is both historically inaccurate and logically baffling. Finally, we are alarmed when a majority of this Court confuses the historic role of the Fifth Amendment with procedural rules reflecting concern over the confidence of witnesses.

The Fifth Amendment was never enacted, nor has it been interpreted, as a device to shore up the excessively timid and nervous criminal defendant. It was enacted to protect against and prevent the use of compelled testimony and statements.

II

SHOULD THIS COURT STAND BY ITS HOLDING THAT CALIFORNIA'S LIMITED COMMENT RULE VIOLATES THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION, THIS JUDGMENT SHOULD NOT BE SUMMARILY REVERSED BUT THE CASE SHOULD BE REMANDED TO THE CALIFORNIA SUPREME COURT FOR AN EVALUATION OF THE PREJUDICIAL EFFECT OF THE COMMENT.

In the past this Court has made it clear that when comment upon a defendant's failure to testify occurs in a federal trial, such error is not reversible per se. For example, in *Wilson v. United States*, 149 U.S. 60 (1893), this Court said at page 70:

> "We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded good ground for a new trial *in all cases where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause.*" (Emphasis added.)

Similarly in *Johnson v. United States*, 318 U.S. 189 (1943), although finding error in comment on the defendant's reliance on the privilege, this Court declined to reverse, finding that the error had been

waived, an implicit holding that the error was not reversible per se. Lower federal courts have also declined to reverse cases because of comment on reliance on the privilege when under the circumstances the error was not deemed of significant prejudicial effect to merit reversal. See *e.g., Coleman v. Denno*, 223 F.Supp. 938 (D.C.S.D. N.Y. 1963), *affirmed, United States v. Denno*, 330 F.2d 441 (2d Cir. 1964), *certiorari denied* 337 U.S. 1003; *United States v. Di Carlo*, 64 F.2d 15 (2d Cir. 1933).

There are two factors in this case which are of key significance in evaluating the possible prejudicial effect flowing from the comment. One is that the comment goes to a patent fact which the jury cannot fail to observe, namely, the failure of the defendant to contradict or deny evidence presented against him. The second is the extremely limited scope of permissible comment sanctioned by the California rule which goes only to the manner in which the jury may evaluate prosecution evidence which the defendant has not explained or denied.

We cannot overemphasize the importance of the need for a holding that error in a state court in the form of comment upon a defendant's failure to testify is not reversible per se. Absent such a holding, we are virtually precluded from defending against collateral attacks upon convictions in which such comment has in fact occurred. For obvious reasons such comment will frequently be found in cases involving the trial of previously convicted felons who decline to take the stand for fear of impeachment as such. Thus, many

of the cases which will be susceptible to collateral attack on this basis will involve defendants under long-term sentences whose convictions have occurred so far in the past that retrial will be impossible because evidence and witnesses are no longer available. The net result will be that some of the most vicious and hardened members of our criminal element will be released to once more prey upon our populace.

We further submit that not only is an evaluation of the prejudicial effect flowing from such comment appropriate, but that this is a determination which should be made in the first instance in the state court. California has a harmless error rule set forth in Article VI, section 4½ of its Constitution, which has been construed to preclude reversal of a conviction for error unless an examination of the entire cause, including the evidence, convinces the reviewing court that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of such error. *People v. Watson,* 46 Cal.2d 818, 299 P.2d 243 (1956); *People v. Parham,* 60 Cal.2d 378, 384 P.2d 1001 (1963). We submit that the application of this harmless error rule in evaluating the prejudicial effect of comment on the defendant's failure to testify in a state trial is perfectly consistent with due process.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that a rehearing be granted in this case so

that the holding in this case may be squared with this Court's decision in *Gainey* and so that the various states may be afforded the same latitude under the Fifth Amendment that *Gainey* affords to the federal government.

Dated, San Francisco, California,
May 19, 1965.

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Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for respondent in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
May 19, 1965.

DERALD E. GRANBERG,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 202.—October Term, 1964.

Eddie Dean Griffin, Petitioner, v. State of California. | On Writ of Certiorari to the Supreme Court of the State of California.

[April 28, 1965.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was convicted of murder in the first degree after a jury trial in the California court. He did not testify at the trial on the issue of guilt, though he did testify at the separate trial [1] on the issue of penalty. The trial court intructed the jury on the issue of guilt, stating that a defendant has a constitutional right not to testify. But it told the jury: [2]

> "As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

It added, however, that no such inference could be drawn as to evidence respecting which he had no knowl-

[1] See Penal Code, § 190.1, providing for separate trials on the two issues.

[2] Article I, § 13, of the California Constitution provides in part:

"... in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

edge. It stated that failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof.

Petitioner had been seen with the deceased the evening of her death, the evidence placing him with her in the alley where her body was found. The prosecutor made much of the failure of petitioner to testify:

"The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.

"What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left?

"He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

"These things he has not seen fit to take the stand and deny or explain.

"And in the whole world, if anybody would know, this defendant would know.

"Essie Mae is dead, she can't tell you her side of the story. The defendant won't."

The death penalty was imposed and the California Supreme Court affirmed. 60 Cal. 2d 182. The case is here on a petition for a writ of certiorari which we granted. 377 U. S. 989, to consider the single question

whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth in *Malloy* v. *Hogan*, 378 U. S. 1, decided after the Supreme Court of California had affirmed the present conviction.[3]

If this were a federal trial, reversible error would have been committed. *Wilson* v. *United States*, 149 U. S. 60 so holds. It is said, however, that the *Wilson* decision rested not on the Fifth Amendment, but on an Act of Congress, namely, 18 U. S. C. § 3481.[4] That indeed is the fact,

[3] The California Supreme Court later held in *People* v. *Modesto*, 62 A. C. 452, that its "comment" rule squared with *Malloy* v. *Hogan*, 378 U. S. 1. The overwhelming consensus of the States, however, is opposed to allowing comment on the defendant's failure to testify. The legislatures or courts of 44 States have recognized that such comment is, in light of the privilege against self-incrimination, "an unwarrantable line of argument." *State* v. *Howard*, 35 S. C. 197, 14 S. E. 481, 483. See 8 Wigmore, Evidence (McNaughton rev. ed. 1961 and 1964 Supp.), § 2272, n. 1. Of the six States which permit comment, two, California and Ohio, give this permission by means of an explicit constitutional qualification of the privilege against self-incrimination. Cal. Const., Art. I, § 13; Ohio Const., Art. I, § 10. New Jersey permits comment, *State* v. *Corby*, 28 N. J. 106, 145 A. 2d 289; cf. *State* v. *Garvin*, — N. J. — (Mar. 22, 1965); but its constitution contains no provision embodying the privilege against self-incrimination (see *Laba* v. *Newark Bd. of Educ.*, 23 N. J. 364, 389, 129 A. 2d 273, 287; *State* v. *White*, 27 N. J. 158, 168–169, 142 A. 2d 65, 70). The absence of an express constitutional privilege against self-incrimination also puts Iowa among the six. See *State* v. *Ferguson*, 226 Iowa 361, 372–373, 283 N. W. 917, 923. Connecticut permits comment by the judge but not by the prosecutor. *State* v. *Heno*, 119 Conn. 29, 174 A. 181. New Mexico permits comment by the prosecutor but holds that the accused is then entitled to an instruction that "the jury shall indulge no presumption against the accused because of his failure to testify." N. M. Stat. Ann. § 41–12–19; *State* v. *Sandoval*, 59 N. M. 85, 279 P. 2d 850.

[4] Section 3481 reads as follows:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory,

as the opinion of the Court in the *Wilson* case states. And see *Adamson* v. *California*, 332 U. S. 46, 50, n. 6; *Bruno* v. *United States*, 308 U. S. 287, 294. But that is the beginning, not the end of our inquiry. The question remains whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment.

We think it does. It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance. The Court in the *Wilson* case stated:

"... the Act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who

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the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833."

The legislative history shows that 18 U. S. C. § 3841 was designed, *inter alia*, to bar counsel for the prosecution from commenting on the defendant's refusal to testify. Mr. Frye of Maine, spokesman for the Bill, said, "That is the law of Massachusetts, and we propose to adopt it as a law of the United States." 7 Cong. Rec., Pt. I, p. 385. The reference was to Mass. Stat. 1866, c. 260, now Mass. Gen. Laws Ann., c. 233, § 20, cl. Third (1959), which is almost identical with 18 U. S. C. § 3481. See also *Commonwealth* v. *Harlow*, 110 Mass. 411; *Commonwealth* v. *Scott*, 123 Mass. 239; *Opinion of the Justices*, 300 Mass. 620, 15 N. E. 2d 662.

would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." 149 U. S., p. 96.

If the words "Fifth Amendment" are substituted for "Act" and for "statute," the spirit of the Self-Incrimination Clause is reflected. For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55, which the Fifth Amendment outlaws.[5] It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within

[5] Our decision today that the Fifth Amendment prohibits comment on the defendant's silence is no innovation, for on a previous occasion a majority of this Court indicated their acceptance of this proposition. In *Adamson* v. *California*, 332 U. S. 46, the question was, as here, whether the Fifth Amendment proscribed California's comment practice. The four dissenters (BLACK, DOUGLAS, Murphy and Rutledge, JJ.) would have answered this question in the affirmative. A fifth member of the Court, Justice Frankfurter, stated in a separate opinion: "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions." *Id.*, at 61. But, though he agreed with the dissenters on this point, he also agreed with Justices Vinson, Reed, Jackson, and Burton that the Fourteenth Amendment did not make the Self-Incrimination Clause of the Fifth Amendment applicable to the States; thus he joined the opinion of the Court which so held (the Court's opinion assumed that the Fifth Amendment barred comment, but it expressly disclaimed any intention to decide the point. *Id.*, at 50).

the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. *People* v. *Modesto*, 62 A. C. 452, 468–469. What the jury may infer given no help from the court is one thing. What they may infer when the court solemnizes the silence of the accused into evidence against him is quite another. That the inference of guilt is not always so natural or irresistible is brought out in the *Modesto* opinion itself:

"Defendant contends that the reason a defendant refuses to testify is that his prior convictions will be introduced in evidence to impeach him ([Cal.] Code Civ. Proc., § 2051) and not that he is unable to deny the accusations. It is true that the defendant might fear that his prior convictions will prejudice the jury, and therefore another possible inference can be drawn from his refusal to take the stand." *Id.*, at 469.

We said in *Malloy* v. *Hogan*, *supra*, p. 11, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the federal government, and, in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.[6]

Reversed.

THE CHIEF JUSTICE took no part in the decision of this case.

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[6] We reserve decision on whether an accused can require, as in *Bruno* v. *United States*, 308 U. S. 287, that the jury be instructed that his silence must be disregarded.

SUPREME COURT OF THE UNITED STATES

No. 202.—October Term, 1964.

Eddie Dean Griffin, Petitioner, v. State of California.	On Writ of Certiorari to the Supreme Court of the State of California.

[April 28, 1965.]

Mr. Justice Harlan, concurring.

I agree with the Court that within the federal judicial system the Fifth Amendment bars adverse comment by federal prosecutors and judges on a defendant's failure to take the stand in a criminal trial, a right accorded him by that amendment. And given last Term's decision in *Malloy* v. *Hogan*, 378 U. S. 1, that the Fifth Amendment applies to the States in all its refinements, I see no legitimate escape from today's decision and therefore concur in it. I do so, however, with great reluctance, since for me the decision exemplifies the creeping paralysis with which this Court's recent adoption of the "incorporation" doctrine is infecting the operation of the federal system. See my concurring opinion in *Pointer* v. *Texas*, — U. S. —, at —.

While I would agree that the accusatorial rather than inquisitorial process is a fundamental part of the "liberty" guaranteed by the Fourteenth Amendment, my Brother Stewart in dissent, *post*, p. —, fully demonstrates that the no-comment rule "might be lost, and justice still be done," *Palko* v. *Connecticut*, 302 U. S. 319, 325. As a "non-fundamental" part of the Fifth Amendment (cf. *Pointer*, at —), I would not, but for *Malloy*, apply the no-comment rule to the States.

Malloy put forward a single argument for applying the Fifth Amendment, *as such*, to the States:

"It would be *incongruous* to have different standards determine the validity of a claim of privilege . . . ,

depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or a state proceeding is justified." *Malloy* v. *Hogan*, *supra*, at 11. (Emphasis added.)

My answer then (378 U. S., at 27) and now is that "incongruity," within the limits of fundamental fairness, is at the heart of our federal system. The powers and responsibilities of the State and Federal Governments are not congruent, and under the Constitution they are not intended to be.

It has also recently been suggested that measuring state procedures against standards of fundamental fairness as reflected in such landmark decisions as *Twining* v. *New Jersey*, 211 U. S. 78, and *Palko* v. *Connecticut*, *supra*, "would require this Court to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction," *Pointer* v. *Texas*, 380 U. S. —, — (concurring opinion of GOLDBERG, J.). This approach to the requirements of federalism, not unlike that evinced by the Court in *Henry* v. *Mississippi*, 379 U. S. 443, apparently leads, in cases like this, to the conclusion that the way to eliminate friction with state judicial systems is not to attempt a working harmony, but to override them altogether.

Although compelled to concur in this decision, I am free to express the hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history.

SUPREME COURT OF THE UNITED STATES

No. 202.—October Term, 1964.

Eddie Dean Griffin, Petitioner, v. State of California. | On Writ of Certiorari to the Supreme Court of the State of California.

[April 28, 1965.]

Mr. Justice Stewart, with whom Mr. Justice White joins, dissenting.

The petitioner chose not to take the witness stand at his trial upon a charge of first degree murder in a California court. Article I, § 13, of the California Constitution establishes a defendant's privilege against self-incrimination and further provides:

> "[I]n any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court, and by counsel, and may be considered by the court or the jury."

In conformity with this provision, the prosecutor in his argument to the jury emphasized that a person accused of crime in a public forum would ordinarily deny or explain the evidence against him if he truthfully could do so.[1] Also in conformity with this California constitutional provision, the judge instructed the jury in the following terms:

> "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within

[1] See the excerpt from the prosecutor's argument quoted in the Court's opinion, *supra*, at p. —.

his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

The jury found the petitioner guilty as charged, and his conviction was affirmed by the Supreme Court of California.[2]

No claim is made that the prosecutor's argument or the trial judge's instructions to the jury in this case deprived the petitioner of due process of law as such. This Court long ago decided that the Due Process Clause of the Fourteenth Amendment does not of its own force forbid this kind of comment on a defendant's failure to testify. *Twining* v. *New Jersey*, 211 U. S. 78; *Adamson* v. *Cali-*

[2] 60 Cal. 2d 182, 383 P. 2d 432. As this case was decided before *Malloy* v. *Hogan*, 378 U. S. 1, the California Supreme Court did not give plenary consideration to the question now before us; however, that court has since upheld the federal constitutionality of the California comment rule in a thoroughly reasoned opinion by Chief Justice Traynor. *People* v. *Modesto*, 62 Cal. 2d 452, 398 P. 2d 753.

fornia, 332 U. S. 46. The Court holds, however, that the California constitutional provision violates the Fifth Amendment's injunction that no person "shall be compelled in any criminal case to be a witness against himself," an injunction which the Court less than a year ago for the first time found was applicable to trials in the courts of the several States.

With both candor and accuracy, the Court concedes that the question before us is one of first impression here.[3] It is a question which has not arisen before, because until last year the self-incrimination provision of the Fifth Amendment had been held to apply only to federal proceedings, and in the federal judicial system the matter has been covered by a specific Act of Congress which has been in effect ever since defendants have been permitted to testify at all in federal criminal trials.[4] See *Bruno* v. *United States*, 308 U. S. 287; *Wilson* v. *United States*, 149 U. S. 60; *Adamson* v. *California*, *supra*.

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[3] In the *Adamson* case, the present question was not reached because the majority ruled that the Fifth Amendment is not applicable to the States. Mr. Justice Reed's opinion made clear that the California rule was only assumed to contravene the Fifth Amendment, "without any intention . . . of ruling upon the issue." The dissenting opinion of MR. JUSTICES BLACK and DOUGLAS read the majority opinion as "strongly imply[ing] that the Fifth Amendment does not, of itself, bar comment upon the failure to testify," but they considered the case on the majority's assumption, thereby giving no approval to that assumption, even in dictum. That no such approval was given by this dissenting opinion is further made evident by the fact that Justices Murphy and Rutledge, also in dissent, felt it necessary to make what they characterized as an "addition" an expression of their view that the guarantee against self-incrimination had been violated in the case. Mr. Justice Frankfurter, in concurring, also indicated that he was prepared to agree that the Fifth Amendment barred comment, thus bringing to three the members of the Court who, in dicta, took the view embraced by the Court today.

[4] 20 Stat. 30, as amended, 18 U. S. C. § 3481.

We must determine whether the petitioner has been "compelled to be a witness against himself." Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.[3]

Those were the lurid realities which lay behind enactment of the Fifth Amendment, a far cry from the subject matter of the case before us. I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. In support of its conclusion that the California procedure does compel the accused to testify, the Court has only this to say: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Exactly what the penalty imposed consists of is not clear. It is not, as I understand the problem, that the jury becomes aware that the defendant has chosen not to testify in his own defense, for the jury will, of course, realize this quite evident fact, even though the choice goes unmentioned. Since com-

[3] See generally 8 Wigmore § 2250 (McNaughton Rev. 1961).

ment by counsel and the court does not compel testimony by creating such an awareness, the Court must be saying that the California constitutional provision places some other compulsion upon the defendant to incriminate himself, some compulsion which the Court does not describe and which I cannot readily perceive.

It is not at all apparent to me, on any realistic view of the trial process, that a defendant will be at more of a disadvantage under the California practice than he would be in a court which permitted no comment at all on his failure to take the witness stand. How can it be said that the inferences drawn by a jury will be more detrimental to a defendant under the limiting and carefully controlling language of the instruction here involved than would result if the jury were left to roam at large with only their untutored instincts to guide them, to draw from the defendant's silence broad inferences of guilt? The instructions in this case expressly cautioned the jury that the defendant's failure to testify "does not create a presumption of guilt or by itself warrant an inference of guilt"; they were further admonished that such failure does not "relieve the prosecution of its burden of proving every essential element of the crime," and finally the trial judge warned that the prosecution's burden remained that of proof "beyond a reasonable doubt." Whether the same limitations would be observed by a jury without the benefit of protective instructions shielding the defendant is certainly open to real doubt.

Moreover, no one can say where the balance of advantage might lie as a result of counsels' discussion of the matter. No doubt the prosecution's argument will seek to encourage the drawing of inferences unfavorable to the defendant. However, the defendant's counsel equally has an opportunity to explain the various other reasons why a defendant may not wish to take the stand, and

thus rebut the natural if uneducated assumption that it is because the defendant cannot truthfully deny the accusations made.

I think the California comment rule is not a coercive device which impairs the right against self-incrimination, but rather a means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness. The California procedure is not only designed to protect the defendant against unwarranted inferences which might be drawn by an uninformed jury; it is also an attempt by the State to recognize and articulate what it believes to be the natural probative force of certain facts. Surely no one would deny that the State has an important interest in throwing the light of rational discussion on that which transpires in the course of a trial, both to protect the defendant from the very real dangers of silence and to shape a legal process designed to ascertain the truth.

The California rule allowing comment by counsel and instruction by the judge on the defendant's failure to take the stand is hardly an idiosyncratic aberration. The Model Code of Evidence, and the Uniform Rules of Evidence both sanction the use of such procedures.[6] The practice had been endorsed by resolution of the American Bar Association and the American Law Institute,[7] and has the support of the weight of scholarly opinion.[8]

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[6] Model Code of Evidence, Rule 201 (1942); Uniform Rules of Evidence, Rule 23 (4) (1953).

[7] 56 A. B. A. Rep. 137–159 (1931); 59 A. B. A. Rep. 130–141 (1934); 9 Proceedings A. L. I. 202, 203 (1931).

[8] See Bruce, The Right to Comment on the Failure of the Accused to Testify, 31 Mich. L. Rev. 226; Dunmore, Comment on Failure of Accused to Testify, 26 Yale L. J. 464; Hadley, Criminal Justice in America, 11 A. B. A. J. 674, 677; Hiscock, Criminal Law and Procedure in New York, 26 Col. L. Rev. 253, 258–262; Note, Comment on Defendant's Failure to Take the Stand, 57 Yale L. J. 145.

The formulation of procedural rules to govern the administration of criminal justice in the various States is properly a matter of local concern. We are charged with no general supervisory power over such matters; our only legitimate function is to prevent violations of the Constitution's commands. California has honored the constitutional command that no person "shall be compelled in any criminal case to be a witness against himself." The petitioner was not compelled to testify, and he did not do so. But whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad. Some States have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand.[9] Other States have dealt with this danger in a variety of ways, as the Court's opinion indicates. *Supra*, note 3, at p. ——. Some might differ, as a matter of policy, with the way California has chosen to deal with the problem, or even disapprove of the judge's specific instructions in this case.[10] But, so long as the constitutional command is obeyed, such matters of state policy are not for this Court to decide.

I would affirm the judgment.

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[9] See, *e. g.*, *State* v. *Pearce*, 56 Minn. 226, 57 N. W. 652; *Tines* v. *Commonwealth*, 25 Ky. L. Rep. 1233, 77 S. W. 363; *Hanks* v. *Commonwealth*, 248 Ky. 203, 58 S. W. 2d 394.

[10] It should be noted that the defendant's counsel did not request any additions to the instructions which would have brought out other possible reasons which might have influenced the defendant's decision not to become a witness. The California Constitution does not in terms prescribe what form of instruction should be given and the petitioner has not argued that another form would have been denied.